BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions Below

The opinion of the Board of Tax Appeals for the District of Columbia (R. 9-34) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 75-80) is not yet reported.

Jurisdiction

The grounds upon which the jurisdiction of this Court is invoked are stated in the petition.

Statement of the Case

The respondent is a Maryland corporation engaged in the operation of a brewery at Cumberland, Maryland (R. 40). It there sold to its District of Columbia distributor or franchisee in the regular course of business beer for distribution to retailers and others in the District of Columbia (R. 44). The beer was dispensed in three types of containers, namely, wooden cases containing twenty-four glass bottles each, metal half-barrels, and metal quarter-barrels (R. 44). While the beer belonged to the distributor or franchisee, the respondent retained ownership of the containers and exacted a deposit to insure their return (R. 51-52). Retailers in the District purchasing respondent's products from the local distributor, and local consumers purchasing from retailers were likewise required to make deposits to insure the return of the containers. These containers remain in the District until the contents have been used and they have found their way back to the local distri-

butor, who returns them to the brewery to be refilled and brought back into the District or sent wherever respondent's products are sold. Daily or in the regular course of business the distributor or franchisee brought the containers filled with beer into the District and returned them to Cumberland when empty, so that at all times there were actually in the District a number of containers belonging to the petitioner. On the tax days of the taxable years here involved, containers belonging to the petitioner were physically present in the District of Columbia as follows (R. 15):

Tax day	Taxable year ending	½ barrels	¼ barrels	Wood Cases, 24 bottles
July 1, 1937	June 30, 1938	402	113	14,690
July 1, 1938	June 30, 1939	311	130	7,214
July 1, 1939	June 30, 1940	218	112	10,366
July 1, 1940	June 30, 1941	614	289	8,910

The Board of Tax Appeals found as a fact that the number of containers in the District on the tax dates involved represented a fair daily average of the number actually in the District during each of the taxable years (R. 15).

The Board of Tax Appeals held that the number of containers in the District on the tax dates involved had a taxable situs in the District of Columbia and were properly taxable under the District statutes (R. 9-34). The Court of Appeals reversed the decision of the Board of Tax Appeals and held that migratory personal property of a nonresident could not be taxed under a general statute such as that applicable to the District of Columbia (R. 75-80).

Specification of Errors

The United States Court of Appeals for the District of Columbia erred:

In holding that the respondent is not taxable under laws applicable to the District of Columbia upon the full and true value of its containers habitually employed in the District of Columbia.

Statutes Involved

Paragraph 2 of Section 6 of the Act of July 1, 1902 (32 Stat. 618; Section 47-1207, D. C. Code, 1940), provides as follows:

> "On all tangible personal property, assessed at a fair cash value (over and above the exemption provided in this section), including vessels, ships, boats, tools, implements, horses, and other animals, carriages, wagons, and other vehicles, there shall be paid to the collector of taxes of the District of Columbia one and one-half per centum on the assessed value thereof."

On June 29, 1922, the following provisions were enacted into law (42 Stat. 669; Section 47-501, D. C. Code, 1940:

> "For the purpose of defraying such expenses of the District of Columbia as Congress may from time to time appropriate for, there hereby is levied for each and every fiscal year, a tax at such rate on the real and personal property subject to taxation in the District as will, when added to the other taxes and revenues of the District, produce money enough to enable the District to pay promptly and in full all sums directed by Congress to be paid by the District, and for which appropriation has been duly made; * * *."

And, in the Act of July 3, 1926 (44 Stat. 833; Section 47-1202, D. C. Code, 1940), it is provided that:

> "All personal property in the District Columbia subject to taxation shall be listed and assessed at not less than the full and true value thereof in lawful money."

Summary of Argument

The statutes levy a tax upon all tangible personal property having a taxable situs in the District of Columbia, and require the filing of returns by the owners of such property. In the case of Johnson Oil Company v. Oklahoma, 290 U. S. 158, this Court construed a general statute of the State of Oklahoma as taxing the personal property of a nonresident habitually employed within that State. The provisions of the District statutes here involved are substantially the same as the provisions of the Oklahoma statute involved in the Johnson Oil Company case. Respondent's personal property here involved was habitually employed in the District of Columbia during the tax years in question, and is properly taxable under this Court's decision in the Johnson Oil Company case.

ARGUMENT

I

Respondent was required to file returns of its personal property having a taxable situs in the District of Columbia.

In its brief and argument before the Court of Appeals, respondent contended that it was not required to file returns of its tangible personal property habitually employed in the District of Columbia. The question of the liability of the respondent to file returns was not presented to the Board of Tax Appeals. It therefore was not properly before the Court of Appeals and was not ruled upon by such Court. However, the applicable statutory provisions relating to the filing of returns are set forth herein for the convenience of the Court in considering what effect, if any, they may have upon the question of liability to the tax.

Section 6, paragraph 1, of the Act of July 1, 1902 (32 Stat. 617; Section 47-1203, D. C. Code, 1940), provides that the Assessor of the District of Columbia shall annually cause to be prepared a printed blank schedule of all tangible personal

property and all general merchandise or stock in trade, owned or held in trust or otherwise subject to taxation; that when such schedule is ready for delivery, notice thereof shall be given by the Assessor by advertisement in one or more of the daily newspapers published in the District, and a copy of said schedule shall be delivered to anyone applying therefor at the office of the Assessor; that "Every person, association, corporation, firm, or company in said District liable to taxation hereunder, and every association, company, executor, administrator, guardian, or trustee holding personal property in trust liable to taxation hereunder, shall, within 30 days after the last publication of said advertisement, as aforesaid, fill out the proper blanks in said schedule with a full and true statement, as in this section hereinbefore required, and make and sign an affidavit to the truth thereof".

Section 6 of the Act of July 1, 1902, *supra*, was amended by the Act of July 3, 1926 (44 Stat. 833), as follows:

> "That the returns of all personal property provided for in section 6 of the said Act of July 1, 1902, shall be made during the month of March in the fiscal year preceding the one under which the assessment is to be levied, and, except as otherwise provided by law, the value of the tangible and intangible property shall be taken as of January 1 for a basis of assessment for the next fiscal year."

The said Section 6 was further amended by the Act of February 18, 1929 (45 Stat. 1227 Section 47-1206, D. C. Code, 1940), as follows:

> "That beginning July 1, 1930, returns of all personal property other than automobiles shall be made in the month of July in the fiscal year in which the assessment is levied and the value of such property shall be made as of the first day of that month except that merchants shall continue to return their average stock in trade as provided in said act of 1902: *Pro-*

vided, That this section shall be effective during March, 1929."

It will be noted that the amendment of July 3, 1926, referred to returns of personal property *provided for in Section 6 of the Act of July 1, 1902,* while the amendment of February 18, 1929, referred to returns of *all personal property* other than automobiles. The language of the 1929 amendment is all-inclusive, and requires returns of all tangible personal property subject to taxation in the District of Columbia.

II

The property here involved had a taxable situs in the District of Columbia and is taxable under the District statutes.

The Court of Appeals held that migratory personal property owned by a nonresident, and habitually employed in the District of Columbia, is not taxable under the District statutes. It is the view of the petitioner that the provisons of the applicable District statutes are substantially the same as the provisions of the Oklahoma statute which this Court, in the case of *Johnson Oil Company* v. *Oklahoma,*[1] construed as taxing migratory personal property owned by a nonresident of Oklahoma but habitually employed in that State. The Oklahoma statute involved in the *Johnson Oil Company* case provides as follows:

> "All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation." [Sec. 1, Chapter 44, Session Laws, 1915, page 64 (Sec. 9574, C. O. S. 1921).]

The Court of Appeals has misconstrued this Court's decision in the *Johnson Oil Company* case in at least three respects: (a) in holding that the conclusion which this Court reached

[1] 290 U. S. 158.

therein was not based on any particular Oklahoma statute; (b) in holding that this Court did not consider the question of statutory construction; and (c) in holding that the Supreme Court of Oklahoma, upon remand of the case, disposed of it under another section of the Oklahoma statute (9640 C. O. S. 1921).

(a)

In taking the view that this Court, in holding the Johnson Oil Company taxable on the basis of the average number of its cars habitually employed within the State of Oklahoma, gave no consideration to any particular statute, the Court of Appeals states (R. 79):

> "But it is a mistake to say that the Supreme Court reached this conclusion on the basis of any particular Oklahoma statute. A careful reading of the opinion shows that the Court was concerned only with stating the broad, general principle that 'when individual items of rolling stock are not continuously the same but are contantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits.' "

That the *Johnson Oil Company* case was decided under the general provisions of Section 9574, C. O. S. 1921, seems free from doubt. The Supreme Court of Oklahoma quotes the section in its opinion (19 P. (2d) 169), and refers to no other provision of the Oklahoma statutes. The records and briefs before this Court in the *Johnson Oil Company* case clearly disclose that the general provisions of Section 9574 were the only statutory provisions involved in the case[2]. Furthermore, the same objection to the statute which was made by the respond-

[2] Transcripts of Record, pages 71, 72; Statements of Jurisdiction, pages 2 and 3; Statements Opposing Jurisdiction, page 2; Brief for Appellant, page 3; Brief for Appellee, page 23.

ent here and sustained by the Court of Appeals was made by the Johnson Oil Company [3] and denied by this Court. The respondent, in the Court of Appeals in this case, relied upon the same cases as the appellant in the *Johnson Oil Company* case.[4]

(b)

With respect to the question of statutory construction, the Court of Appeals states (R. 80):

> "But from the beginning to the end of the opinion of the Supreme Court of the United States there is nothing to even suggest that the Court considered the question of statutory interpretation."

It seems plain that this Court did construe the Oklahoma statute in the *Johnson Oil Company* case. The Supreme Court of Oklahoma, in its original opinion [5] construed the statute as taxing all the cars of the Johnson Oil Company, and expressly held (19 P. (2d) 170) that

> "There is no law authorizing a tax based upon an 'average number' of cars present on a given day at any one taxable point, * * *."

This Court held that the basis of the jurisdiction is the habitual employment of the property within the State, and that Oklahoma was entitled to tax the number of cars which, on the average, were found within the State. The judgments of the Supreme Court of Oklahoma were reversed and the cases remanded for further proceedings not inconsistent with this Court's opinion. When the cases were considered by the Supreme Court of Oklahoma after remand,[6] the Johnson Oil Company made motions to have them remanded to the trial

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[3] Part 3, beginning on page 24, Brief for Appellant;
[4] *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117; *Tamble* v. *Pullman Co.*, 207 F. 30.
[5] 162 Okla. 183, 19 P. (2d) 168.
[6] 167 Okla. 452, 30 P. (2d) 692.

courts with directions to set aside the judgments there rendered and render judgments in favor of the Johnson Oil Company. In support of such motions it was argued that the Supreme Court of Oklahoma had held that there was no law in Oklahoma authorizing a tax based upon the average number of cars present on a given day at any one taxable point. The Court agreed that it had so held but pointed out that its holding had been reversed by this Court, and held that under this Court's decision the Johnson Oil Company was taxable on the basis of the number of cars which on the average were physically present within the State.

(c)

The opinion of the Court of Appeals points out that at the time of this Court's decision in the *Johnson Oil Company* case there were in existence two statutes in Oklahoma, one taxing all property, real and personal[7], and the other taxing the property of sleeping car companies, freight car companies, car corporations, or companies engaged in business in the State.[8] The opinion then states (R. 80) that

[7] Sec. 9574, C. O. S. 1921, quoted on page 10 of this brief.
[8] Sec. 9640, C. O. S. 1921, provides as follows:

> "Every sleeping-car company, freight car company, car corporation, or company engaged in business in this state, shall file with the Auditor a statement under oath, showing the aggregate number of miles made by cars operated by such company over the several lines of railroad in this State during the fiscal year next preceding the date of such statement; the total number of cars owned by such company and the total value thereof, and the average number of miles traveled by cars of the particular class covered by the statement in the ordinary course of business during the fiscal year, and it shall be the duty of the state board of equalization to ascertain the number of cars required to make the total mileage of cars of such corporation within the period of one year. Said board shall ascertain and fix a valuation upon each particular class of said cars, and the number so ascertained to be required to make the total mileage of the cars of such corporation, within the period of one year, shall be assessed to the respective corporations, and such assessment shall be included in the record of the proceedings of the board and shall be certified by the state auditor to the county clerks of the several counties of the State wherein such cars are operated in the same manner as the property of other public service corporations is certified and returned."

> "After the remand by the Supreme Court the case was disposed of in the Supreme Court of the State (30 P. (2d) 692) on the basis of the average number of cars present on a given day at any one taxable point, *doubtless responsive to the latter section.*" (Emphasis supplied.)

It is apparent that the conclusion stated by the Court of Appeals was reached without reading the opinion of the Supreme Court of Oklahoma, which latter opinion states (30 P. (2d) 693):

> "That the cars in question are personal property, and that such of them as are taxable in Oklahoma are taxable as such under the provisions of section 9574, C. O. S. 1921, is beyond question."

Section 9640[9] is a part of Article V, Chapter 84, C. O. S. 1921, all of which Article deals exclusively with assessment of public service corporations. Obviously, the Johnson Oil Company is not a public service corporation. Throughout the entire history of the litigation there is no suggestion by the taxing authorities of Oklahoma or anyone else that the Johnson Oil Company could possibly be taxable under the provisions of Section 9640. Furthermore, the method of taxation prescribed in Section 9640 is different from that employed in taxing the cars of the Johnson Oil Company. Under Section 9640, the number of cars to be taxed is determined by the mileage traveled in Oklahoma during the tax year divided by the average number of miles traveled by all cars of the same class owned by such public service corporation. In other words, the tax imposed by Section 9640 is determined on the basis of mileage traveled in Oklahoma as compared to total mileage traveled by the cars of a public service corporation, whereas the tax in the *Johnson Oil Company* case was determined on the basis of the average number of cars habitually employed within the

[9] Quoted in full in Note 8, page 13 hereof.

State without regard to mileage traveled by such cars either within or without the State.

CONCLUSION

It is respectfully submitted that this case is one of general importance which should be decided by this Court; that the Court of Appeals has not given proper effect to the decision of this Court in the case of *Johnson Oil Company* v. *Oklahoma*, *supra*, and that a writ of certiorari should be granted, and this Court should review the decision of the United States Court of Appeals for the District of Columbia, and finally reverse said decision.

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